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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

TYSON HEDER, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B284623 (Los Angeles County Super. Ct. No. BC495341)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Affirmed.

Law Offices of Joseph W. Singleton, Joseph W. Singleton and Heather E. Sterling for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Jonathan H. Eisenman, Deputy City Attorney for Defendants and Respondents.

Tyson Heder (appellant) appeals from a judgment entered after a jury trial on his claims of battery, false arrest, violation of the Bane Act (Civ. Code, § 52.1),[1] and intentional infliction of emotional distress against the City of Los Angeles (City) and several members of the Los Angeles Police Department (LAPD) (collectively "respondents").[2] After eight days of trial, where respondents defended against appellant's false arrest claim on the ground that there was probable cause for appellant's arrest, the jury returned a special verdict in favor of respondents on all claims. The trial court entered judgment accordingly.

On appeal, appellant argues that the trial court erroneously instructed the jury on respondents' probable cause defense. Specifically, appellant argues that one of the alternative bases for a finding of probable cause was an ordinance that appellant claims: (1) was not being enforced; and (2) would have been unconstitutional if enforced against appellant.

Further, appellant argues that the trial court erred in excluding two pieces of evidence: (1) City Resolution CF 09-0234-S1 (the resolution); and (2) exhibit 67/93, a video that was never authenticated, purportedly shot by an independent journalist.

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[1] The Bane Act permits a civil action against any person who interferes "by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state." (Civ. Code, § 52.1, subd. (b).)

[2] The individual defendants are Officer Joshua Medina, Officer Lyndon Barber, Sergeant Rudy Barillas, Officer Thomas Vago, and Captain John Incontro. Vago was a defendant only on the battery claim.

Finally, appellant argues that the jury's finding that Officer Medina used excessive force against him conflicts with the jury's finding that such force did not cause him harm as a matter of law.

We find no error, and affirm the judgment.

FACTUAL BACKGROUND

The "Occupy" movement in Los Angeles

The "Occupy" protest movement was a multi-city protest directed chiefly at economic inequality. As part of the Occupy movement, protesters filled Los Angeles City Hall Park (park) beginning on October 1, 2011.

On October 12, 2011, the City Council submitted the resolution for the Mayor's approval. The purpose of the resolution was "to support the First Amendment rights carried out by 'Occupy Los Angeles' and address[] concerns regarding the responsible banking measure." Following a long series of "whereas" clauses addressing economic inequality and the banks' roles in aggravating it, the City Council resolved that:

> "[T]he City of Los Angeles hereby stands in SUPPORT for the continuation of the peaceful and vibrant exercise in First Amendment Rights carried out by 'Occupy Los Angeles' and urges the City Departments responsible for completing the implementation plan associated with the Responsible Banking Measure (CF 09-0234) that was approved by the Council on March 5th, 2010, which would address some of the concerns of the 'Occupy Los Angeles' demonstrators by demanding accountability and results from the Banks we invest taxpayer dollars in, to bring the Responsible Banking measure for a final vote to the Council by October 28th, 2011."[3]

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[3] The last clause of the last sentence of the resolution was later amended to read: "to bring the Responsible Banking measure *to the Budget and Finance Committee for consideration*

The resolution did not specifically allow protesters to remain in the park, nor did it purport to suspend enforcement of any city ordinances.

The resolution was returned without the Mayor's signature, and was thus deemed approved on October 25, 2011.

The Occupy movement protesters continued to remain in the park throughout October 2011 and into November 2011. Eventually the park became a public health hazard. On November 25, 2011, Mayor Villaraigosa issued a release announcing the temporary closure of the park. It stated:

> "City Hall Park will close at 12:01 AM on Monday, November 28, 2011, because the City of Los Angeles cannot maintain the public safety of a long-term encampment. During the period when City Hall Park is closed, a Free Speech area on the Spring Street City Hall steps will remain open during regular park hours."

The LAPD plan to clear the park of protesters

The LAPD created a plan to clear the park of protesters. Lieutenant Brian Morrison developed the tactical plan for the eviction of Occupy LA from the park. The plan was to divide the people in the park into manageable sized groups consisting of eight sectors. An additional sector, sector nine, was created on the morning of November 30, 2011, at around 12:14 a.m., in the middle of the other eight sectors. Sector nine was created because a crowd had unexpectedly formed in that area.

The plan called for police officers to line up shoulder to shoulder on each side of a walkway and face outward into the park, forming "skirmish lines," with space in the middle of the walkway for other officers to move around. The idea was to contain the protesters within the sectors and then give them the

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on/by November 21, 2011 and to the Council later that week for a preliminary discussion."

opportunity to leave. The police wanted to control the egress of each group in order to avoid "one large mass forming." The police would order the crowd to disperse, then arrest anyone who remained for unlawful assembly.[4]

The officers were deployed from various places. A large contingent came out of City Hall and moved to the south lawn area of the park. The officers assigned to sector nine was to be the last group being deployed from City Hall.

The element of surprise was necessary in order to prevent word from getting out on social media. The experience in other cities was that when information was released on social media it created a large influx of people. However, as the officers moved into each area, orders were given by bullhorn to leave the area. In addition, officers in the lines of scrimmage were told to tell people to "move" or "leave the area."

LAPD permitted the media to be in safe areas so that members of the media would not interfere with the operation. Members of the media were assigned to pools and required to wear identifying paraphernalia so that LAPD officers would know those individuals were not in violation of orders to leave. Individuals who wanted to provide coverage of the event but had not been given access as part of a pool could still provide coverage from a distance. There was an area directly across the street designated for such individuals. However, anyone who entered the park would be subject to arrest if they entered in violation of an order to disperse.

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[4] Penal Code section 409 provides that: "Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor."

The eviction plea went forward in the early morning of November 30, 2011.

Appellant's arrest

Appellant is a freelance videographer and photographer. On the night of November 29, 2011, he was carrying a camera while at a bar on the corner of Second and Hill Streets. When he left the bar, appellant saw two helicopters circling above City Hall, which piqued his curiosity. Appellant walked toward City Hall and began taking photographs. He also made a video recording as he walked through the Occupy encampment.

Appellant observed the officers coming out of City Hall and lining up. As appellant approached City Hall, an officer told him to "stay back." Instead, appellant proceeded up the steps of City Hall, against the tide of police officers who were streaming out. Sergeant Barillas approached appellant, touched him lightly on the elbow, and said "come on." Appellant grabbed hold of the handrail on the steps and immediately started yelling loudly, "don't touch me." Appellant's yelling nearly drowned out Sergeant Barillas's statement, "Okay, let's go." Sergeant Barillas repeated this statement four times. Appellant refused to let go of the handrail. Sergeant Barillas used his baton and pushed appellant across the chest area in a lateral motion to disengage him from the handrail. Appellant then began walking back up the steps towards Sergeant Barillas in a confrontational manner, yelling, "Really dickhead? What's your name? What's your fucking name?" Barillas testified that appellant then spat on him, which appellant denied. As appellant confronted the police officers, he was told to put up his hands on top of his head. As appellant continued yelling at the officers, Captain Incontro made the decision that appellant was subject to arrest for "delaying and interfering with the officers being able to get their job done." Captain Incontro explained that his main concern was

that appellant "was delaying the officers . . . and that he should be taken into custody, because we have a lot to do and a lot of people to deal with." Captain Incontro was concerned with appellant's "aggressive movement, and his failure to listen to the officers."

Officer Seiker approached appellant from behind and got a hold of appellant's right arm. Appellant pulled away and moved in the direction of Sergeant Barillas, who then grabbed his left arm. Appellant continued to pull away from the two officers, causing them all to move in a semi-circle. Because appellant was resisting, Officer Seiker conducted a "leg sweep" which caused them all to go to the ground.

Officers Barber, Medina, and Vago came over to assist with the arrest. Officer Medina observed appellant violently kicking and screaming. He put his right knee on appellant's upper torso and put some of his body weight on appellant. Appellant testified that he felt pressure on his head, and was moving his body in order to get away from that pressure. Officer Vago attempted to handcuff appellant, but could not do so since the camera strap appellant was clutching interfered with the officer's efforts. Officer Barber attempted to unravel the camera strap, but when he did so, appellant grabbed onto the metal cuff and the flex cuff that the officers were attempting to place on his wrists. Officer Vago explained, "we couldn't get any one thing out of his hand without him grabbing onto another." One Officer repeated, "Let go, sir, let go." In order to distract appellant, Officer Vago applied five punches to the right side of appellant's right thigh. The punches were applied to distract appellant and gain compliance. Officer Vago believed this tactic was effective. The distraction allowed the officers to cuff appellant's hands together. Appellant was cuffed with a metal cuff on his right hand and a flex cuff on his left hand. The two cuffs were then connected,

because the officers were unable to reach a single set of handcuffs together. Appellant was therefore handcuffed with his hands farther apart than usual.

Once he was handcuffed, Officers Barber and Medina escorted appellant towards City Hall to find a field jail. Appellant resisted the entire way, yelling "what did I do?" As they entered City Hall, appellant's left hand came loose from the flex cuff. With his left hand loose, Officers Medina and Barber guided appellant to the ground in order to re-cuff him. Appellant used the force of his body to twist around and face Officer Medina. Officers Medina and Barber instructed appellant to stop resisting. Appellant then spit on Officer Medina's face shield. In order to overcome appellant's resistance, and prevent him from continuing to resist and cause problems, Medina punched appellant two times in the face. Medina testified that because it had taken four officers to get appellant into a makeshift handcuff outside, he felt that force was necessary to handcuff him at that point. When Officer Medina hit appellant, appellant was stunned and stopped resisting. At that point Officers Medina and Barber were able to properly handcuff appellant in metal handcuffs. Officers Barber and Medina later completed a police report listing battery on an officer as the offense for which there was probable cause to arrest appellant, based on appellant's act of spitting on Medina.

Appellant was later prosecuted for battery and obstructing a police officer in the course of his duties, but was acquitted of those charges.

Timing of appellant's arrest

Appellant testified that prior to his arrest he did not receive any indication that the park was closed. There were no signs or fences indicating that the park was closed, and there were numerous people milling about, in a street fair type of

environment. Appellant testified that he believed that if the park was going to be closed, there would be an announcement asking people to leave.

Officer Sieker, Officer Barber, Sergeant Barillas, Officer Vago, and Captain Incontro all testified that they believed the crowd had been ordered to disperse before they entered the park. However, the dispersal order was not given until 12:30 a.m. Appellant was arrested at approximately 12:15 a.m. The police subsequently arrested nearly 300 protesters for unlawful assembly.

PROCEDURAL HISTORY

Following his acquittal of the criminal charges against him, appellant timely filed a government claim, which the city rejected on May 17, 2012. On November 13, 2012, appellant filed a complaint against respondents for assault and battery; intentional infliction of emotional distress; false arrest and false imprisonment; violation of Civil Code section 52.1 (Bane Act); and other civil rights violations, and other claims. Ultimately it was the claims of battery, false arrest, violation of the Bane Act, and intentional infliction of emotional distress that went to trial.

Appellant's motion in limine no. 2

Appellant's motion in limine no. 2 sought to exclude at trial the use or mention of City Ordinance LAMC 63.44 (the ordinance).[5] Appellant sought to exclude the ordinance from evidence at trial because (1) neither appellant nor any of the other individuals arrested that night were arrested or cited for a violation of the ordinance; (2) there was no mention of the ordinance in any of the multiple police narratives of what took

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[5] The ordinance provides that "[n]o person shall enter, remain, stay or loiter in any park between the hours of 10:30 p.m. and 5:00 a.m. of the following day." (L.A. Mun. Code, § 63.44B14(a).)

place that night, nor in the criminal complaint; (3) appellant was not arrested for violation of the ordinance, nor was his eviction predicated on the ordinance; and (4) the ordinance was brought up later only as a means of misleading the jury. The trial court denied the motion.

Trial, verdict and judgment

Evidence was presented at trial from March 28, 2017 through April 7, 2017. Appellant requested the trial court take judicial notice of the city's resolution supporting the Occupy movement and the responsible banking measure. Appellant's counsel argued that the resolution "invited" the protesters to remain in the park, and thus enforcement of the park hours ordinance was unconstitutional under the circumstances. The court denied appellant's request on the grounds that it would add nothing to the juror's knowledge and was not an appropriate matter for judicial notice.

During trial, appellant's counsel sought to admit exhibit 67/93, a video of appellant's arrest taken from a different angle than other videos. The video had not been produced before trial. The court noted, "I'm a little concerned that no one has seen this. I have no idea what's about to be played." Appellant's counsel then permitted respondents' counsel to have the video for viewing, stating:

> "It's a video that I obtained recently that shows -- it's of the same event, but you can see the hands, and you can see there's no camera strap wrapped around anybody's wrist. And a lot of what they're saying is just made up. And it's used completely for impeachment purposes."

The court inquired, "Who made this video? How do we know about it?" Appellant's counsel responded, "You can see him in the other videos. He's one of the photographers." The parties

then discussed the identity of the photographer and the reason the video had not been produced before discovery was closed. Following the discussion the court engaged in the following colloquy with appellant's counsel:

> "THE COURT: Is [the photographer] here? Maybe we can have a 402 as to him, when he sent it over to defense counsel, what he's done?
>
> "COUNSEL: I can -- hopefully I can get him here. I believe I can get him here.
>
> "THE COURT: Let's take a break and get some foundation on this thing."

Appellant provides no further citations to the record regarding exhibit 67/93. There is no indication in the record that the photographer was ever present in court or that appellant made any alternative efforts to lay a foundation for the video.

The case was argued and submitted to the jury on April 10, 2017. The jury returned its verdict on April 11, 2017. The jury found that only Officer Medina used unreasonable force in detaining appellant, and that such use of unreasonable force was not a substantial factor in causing harm to appellant.

Regarding the claim for false arrest, the verdict form posed the following question regarding probable cause:

> "Did Joshua Medina; Lyndon Barber; Rudy Barillas; and John Incontro reasonably believe that [appellant] was in City Hall Park when the park was closed between the hours of 10:30 pm and 5:00 am the following day; or that [appellant] delayed, obstructed, or resisted a peace officer in the performance of [his] duties; or that [appellant] committed battery upon a peace officer?"
>
> The jurors answered "YES" as to each peace officer.

The jurors found no violation of the Bane Act was committed. Further, the jurors found that none of the officers acted outrageously, and thus no claim of intentional infliction of emotional distress was proved. No damages were awarded to appellant, and accordingly, on June 21, 2017, the court entered judgment in favor of respondents.

Posttrial motions and filings

On July 19, 2017, appellant moved for judgment notwithstanding the verdict (JNOV) and a new trial. The JNOV motion was brought on the ground that Officer Medina's use of excessive force, coupled with the undisputed evidence in the case, caused appellant harm as a matter of law. In the motion for new trial, appellant argued that: (1) inclusion of the ordinance on the jury form as a retroactive basis for probable cause was prejudicial error; (2) denial of appellant's request for judicial notice of the resolution was improper; and (3) denial of admission of exhibit 67/93 was error, among other things. On August 18, 2017, the trial court denied the motions.

On August 21, 2017, appellant filed his notice of appeal.

DICUSSION

Appellant raises four issues: (1) whether the trial court properly permitted the ordinance to serve as a basis for probable cause; (2) whether it was error for the trial court to deny appellant's request to judicially notice the resolution; (3) whether it was error for the trial court to exclude exhibit 67/93; and (4) whether the finding that Officer Medina used excessive force against appellant mandates a finding that Officer Medina caused harm to appellant as a matter of law.

I. The ordinance

A. Standard of review

Appellant argues that the trial court should not have permitted respondents to use the ordinance as a retroactive basis

for probable cause. This question does not involve the resolution of disputed facts and is therefore reviewed de novo. (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 928.) Appellant also raises questions regarding the constitutionality of enforcement of the ordinance against him. Constitutional questions are also reviewed de novo. (*Herbst v. Swan* (2002) 102 Cal.App.4th 813, 816.)

B. The court's ruling on appellant's objection to the use of the ordinance in the jury instruction

Appellant objected to the instruction given to the jury on respondents' affirmative defense of probable cause due to its inclusion of the ordinance as a possible basis for probable cause. Appellant argued that there was no evidence in the record that the officers acted to enforce the ordinance. The court replied, "is that the standard?" Counsel responded that it was not. The court concluded, "the fact that [appellant] didn't know about the law or its enforcement is irrelevant . . . because it's viewed from the reasonable officer's perspective." Appellant's objection was overruled.

C. The court did not err in using the ordinance as part of the jury instruction on probable cause

Probable cause may be based on an offense not identified by an officer at the time of arrest. (*Devenpeck v. Alford* (2004) 543 U.S. 146, 151 (*Devenpeck*).) In *Devenpeck*, the defendant was pulled over and arrested for impersonating a police officer and for covertly recording his roadside conversations with the police officers. (*Id.* at pp. 149-150.) The arresting officer was under the mistaken impression that the defendant was not permitted to record their conversation under the Washington Privacy Act. (*Ibid.*) When the defendant was booked he was charged with a violation of the Privacy Act. (*Id.* at p. 150.) The charge was later dismissed, and the defendant filed suit for unlawful arrest and

imprisonment on the ground that there was no probable cause for his arrest. (*Id.* at p. 151.) A unanimous jury verdict in favor of the law enforcement officers was reversed by the Ninth Circuit on the ground that the officers could not have had probable cause because they cited only the Privacy Act and "'[t]ape recording officers conducting a traffic stop is not a crime in Washington.'" (*Id.* at p. 152.) The Supreme Court reversed, holding that the offense establishing probable cause need not be closely related to, nor based on the same conduct, as the offense identified by the arresting officer. (*Id.* at p. 153.) In doing so, the high court reiterated that "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause." (*Id.* at p. 153.) Thus, the officer's "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (*Ibid.*) The rationale for this rule is that probable cause should not turn on whether the arresting officer was a knowledgeable veteran or a rookie. (*Ibid.*) Instead, it should turn on whether or not the defendant's conduct objectively violated a law.

Devenpeck thus supports the trial court's conclusion that it did not matter whether or not appellant was charged with a violation of the ordinance for the existence of the ordinance to provide a basis for probable cause. Appellant was in City Hall park after hours, in violation of the ordinance, and this fact gave rise to probable cause for his arrest. Because probable cause objectively existed based on a violation of the ordinance, the ordinance can support the jury's finding of probable cause.

Appellant acknowledges that *Devenpeck* holds that the crime for which there was probable cause need not be the one that the officer stated at the time of arrest, nor even closely related to the crime stated by the officer at the time of arrest. (*Devenpeck, supra,* 543 U.S. at pp. 153-155.) However, appellant

argues that this case raises a different issue -- namely, whether an arrest can be justified by a law that was not being enforced, and/or would have been unenforceable under the circumstances. Appellant argues that the park was open, people were invited, and thousands were present, and no other individual in the park that night was arrested for violating the ordinance.

For the reasons set forth below, we find appellant's efforts to distinguish *Devenpeck* unpersuasive.

1. The resolution did not render the ordinance unenforceable

Appellant claims the resolution served to suspend enforcement of the ordinance. That through the ordinance, the City Council approved camping on the lawn of City Hall. However, the ordinance contains no such language. While it articulates general support for the "'Occupy Los Angeles'" movement and the "continuation of the peaceful and vibrant exercise in First Amendment rights" carried out by the movement, it does not purport to suspend the ordinance or any other criminal laws.

Appellant cites section 240 of the Los Angeles City Charter, which reads:

> "All legislative power of the City except as otherwise provided in the Charter is vested in the Council and shall be exercised by ordinance, subject to the power of veto or approval by the Mayor as set forth in the Charter. Other action of the Council may be by order or resolution, not inconsistent with the duties and responsibilities set forth in the Charter or ordinance. Except as otherwise specifically provided in the Charter, the Council shall have full power to pass ordinances upon any subject of municipal concern."

Appellant argues that the only lawful means by which an official City position, as expressed by resolution, may be amended or rescinded is through adoption of a subsequent resolution by

the City Council that, through the normal legislative process with respect to resolutions, is then sent to the Mayor for his consideration. (L.A. Admin. Code, § 2.19, subd. (b).)

Appellant's position is problematic for several reasons. First, the resolution did not purport to suspend the ordinance, thus a subsequent resolution was unnecessary to allow enforcement of the ordinance. Further, as set forth in the Charter passage cited above, nonlegislative action, such as that done by way of resolution, must not be inconsistent with any obligations set forth in the Charter or an ordinance. (L.A. City Charter, § 240.) In other words, the resolution, unlike the ordinance, lacked the force of law. (*Midway Orchards v. County of Butte* (1990) 220 Cal.App.3d 765, 774 ["'A resolution is usually a mere declaration with respect to future purpose of proceedings of the board. An ordinance is a local law which is adopted with all the legal formality of a statute'"].)

Thus, even if the resolution purported to suspend the ordinance and allow individuals to remain in the park after 10:30 p.m., it did not have the force of law. Instead, it merely stated the City Council's resolve to support the Occupy movement and the responsible banking measure.

Finally, On November 25, 2011, several days prior to appellant's arrest, Mayor Villaraigosa released an announcement of the temporary closure of the park:

> "City Hall Park will close at 12:01 AM on Monday, November 28, 2011, because the City of Los Angeles cannot maintain the public safety of a long-term encampment. During the period when City Hall Park is closed, a Free Speech area on the Spring Street City Hall steps will remain open during regular park hours."

The Mayor's announcement of the park closure due to public safety concerns, undermines any suggestion that the resolution permitted protesters to remain in the park.

2. The trial court did not err in declining to take judicial notice of the resolution

Any ruling by the trial court on admissibility of evidence, including a request for judicial notice, is reviewed under the abuse of discretion standard. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271.) A trial court's decision not to take judicial notice will be upheld on appeal unless the reviewing court determines that the moving party furnished information to the trial court that was so persuasive that no reasonable judge would have refused to take judicial notice. (*Willis v. State of California* (1994) 22 Cal.App.4th 287, 291.)

As set forth above, appellant has failed to show that the resolution permitted appellant, or anyone, to be in the park on the night in question. Nor did the resolution purport to suspend enforcement of the ordinance. The resolution was not persuasive evidence undermining the propriety of the ordinance as a basis for probable cause. Under the circumstances, the trial court did not abuse its discretion in declining to take judicial notice of the resolution.

3. Appellant's First Amendment and free speech arguments are not relevant

Both the Federal and California Constitutions protect the right to freedom of speech and freedom of the press. (U.S. Const., 1st Amend.; Cal. Const., art. 1, § 2.) Appellant argues that enforcement of the ordinance against him would violate his First

Amendment rights.[6] Because the ordinance was not enforced against him, this argument is not relevant.[7]

Assuming appellant was exercising his constitutional rights in the park that night, he nevertheless fails to make a legal connection between the use of the ordinance as a basis for probable cause and the potential unconstitutionality of enforcement of that ordinance against him. "Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1037.) An arrest without probable cause is a violation of the Fourth Amendment. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 978 (*Bender*).) In this case, an objectively reasonable officer could have entertained a strong suspicion that

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[6] Appellant was not prosecuted for violation of the ordinance, but was prosecuted, and acquitted, on charges of battery and obstructing a police officer in the course of his duties.

[7] We note that appellant does not provide citation to authority suggesting that his actions that night constituted protected speech. He admits he was not a protester, but went to City Hall to observe the activity upon seeing police helicopters. (See, e.g., *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1111, citing *Dallas v. Stanglin* (1989) 490 U.S. 19, 25 ["'[i]t is possible to find some kernel of expression in almost every activity a person undertakes -- for example, walking down the street or meeting one's friends at a shopping mall -- but such a kernel is not sufficient to bring the activity within the protection of the First Amendment'"].) However, we assume for the purposes of this opinion that appellant was exercising his First Amendment rights by walking into the park that night with a camera.

appellant was in violation of the ordinance at the time of his arrest.[8]

Appellant's arguments that he could not have been prosecuted for violation of the ordinance due to the First Amendment serve to confuse the issues. The two questions: (1) whether the officers had probable cause to arrest appellant for violation of the ordinance, and (2) whether the ordinance could constitutionally be enforced against him -- are separate. A later acquittal under the protections of the First Amendment would not prove lack of probable cause for arrest. (*Bender, supra*, 217 Cal.App.4th at p. 984.) Appellant makes no effort to explain this gap in reasoning.

Even if he had been prosecuted for violation of the ordinance, reasonable content-neutral time and place restrictions on speech are permissible. (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 792 [holding that city's sound-amplification guideline was sufficiently narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume].) Closing parks to the public at night is a content-neutral restriction that does not violate the protections offered by the Federal and California Constitutions. (*Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 294-296 [holding that National Park Service regulation prohibiting sleeping overnight in park is a reasonable time, place, and manner regulation, even if the overnight sleeping was expressive conduct connected with a demonstration].) Thus, arresting a person in a park after closing, even if that person was in the park to engage in free speech, does not implicate free speech and assembly protections. (See, e.g., *Virginia v. Hicks*

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[8] This is particularly true given the officers' testimony that they believed the occupants of the park had already been given orders to disperse.

(2003) 539 U.S. 113, 123 [finding defendant was appropriately punished as a trespasser for his nonexpressive conduct -- entry in violation of the notice-barment rule -- not his speech].)

In sum, appellant has failed to show that inclusion of the ordinance as one of three alternate bases for probable cause was improper as somehow antithetical to his First Amendment rights.

4. Appellant's due process and equal protection arguments are not relevant

The Fourteenth Amendment to the United States Constitution provides, in part, that no state shall deprive any person of life, liberty, or property without due process of law. (U.S. Const., 5th Amend. & 14th Amend.) The California constitution contains a similar due process requirement. (Cal. Const., art. 1, §§ 7(a), 15.) Appellant makes several arguments as to why enforcement of the ordinance against him constitutes a violation of the due process clauses of the state and federal constitutions. He argues that (1) the resolution and ordinance, read together, are overly vague and did not provide citizens with fair warning of the proscribed conduct; (2) application of the ordinance to appellant would be arbitrary and unreasonable given that everyone else in the park was permitted to remain until an order to disperse was given; and (3) enforcement of the ordinance against appellant would be retaliatory and discriminatory as it would make him a class of one. As set forth above, appellant was never prosecuted for violation of the ordinance.

Appellant's due process arguments suffer from the same flaw as his First Amendment arguments. In short, the question of whether the ordinance could provide a basis for probable cause is separate and distinct from the question of whether the ordinance was constitutionally enforceable against appellant. A later acquittal under the protections of the due process clauses of

the federal and state constitutions would not prove lack of probable cause for his arrest. (*Bender, supra*, 217 Cal.App.4th at p. 984.) Again, appellant makes no effort to explain this gap in reasoning.

Further, even if they were relevant, appellant's due process challenges are not persuasive. Appellant cites *People v. Barksdale* (1972) 8 Cal.3d 320, 326 as an example of unconstitutional enforcement of an overly vague criminal statute that did not warn the citizens of the proscribed conduct. Unlike the statute at issue in *Barksdale*, and contrary to appellant's position, the resolution and ordinance, read together, are not overly vague. Appellant's argument is based on the erroneous premise that the resolution, in contrast to the ordinance, "invit[ed]" protestors "to continue their 24 hour-a-day protest in the Park." No language within the resolution articulated such an invitation. Instead, the resolution merely expressed support for the protesters and urged passage of the Responsible Banking Measure. It did not reference the ordinance or purport to overrule it. Thus, appellant's substantive due process argument based on vagueness is not well taken.

Appellant's claim of arbitrary and unreasonable enforcement is similarly unconvincing. Appellant cites *Connally v. General Constr. Co.* (1926) 269 U.S. 385, 391 as an example of a statute that was held unconstitutional because its terms were so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application." (*Ibid.*) The statute under review in *Connally* mandated that a contractor pay his employees "'not less than the current rate of per diem wages in the locality where the work is performed,'" or incur severe and cumulative penalties. (*Id.* at p. 393.) Because it was not easy to determine the "'current rate of wages,'" the punishable behavior was "incapable of any definite answer." (*Id.* at p. 394.) The same

issue is not present here. Appellant points to no indefinite language in the ordinance, and the resolution did not purport to override it.

Appellant was not a "'class of one.'" (*Willowbrook v. Olech* (2000) 528 U.S. 562, 564.) In *Willowbrook*, property owners claimed a city's act of requiring a longer easement in order to connect their home to the municipal water supply than was required for other property owners violated the Equal Protection Clause of the Fourteenth Amendment. (*Id.* at p. 563.) The Supreme Court concluded that an individual may proceed under the Equal Protection Clause as a "class of one," where a plaintiff "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (*Id.* at p. 564.) Appellant claims that there were thousands of people in the park that night, and of the approximately 278 people arrested, not one was arrested for violating the ordinance. Appellant suggests that his arrest for violation of the ordinance would therefore render him a class of one.

Appellant fails to cite a case in which the class of one argument has been applied in the context of a police officer's decision to arrest one individual where others may be violating the same law. In fact, the Supreme Court has recognized that "some forms of state action," which "by their nature involve discretionary decisionmaking" based on "subjective, individualized assessments" are not subject to challenge based on the arbitrary singling out of a particular person. (*Enquist v. Or. Dep't of Agric.* (2008) 553 U.S. 591, 603.) For example, if a traffic officer is positioned on a busy highway where people often drive above the speed limit, and the officer gives only one of those people a ticket, the speeder cannot complain that he is a class of one simply because the other speeders did not receive tickets.

(*Id.* at p. 604.) The traffic officer example highlighted by the Supreme Court is directly applicable here, and appellant makes no convincing argument to the contrary.

Appellant has failed to show that the trial court's use of the ordinance as a basis for a finding of probable cause was unconstitutional for any reason.

5. The Supreme Court authority cited by appellant is distinguishable

Appellant argues that under the recent case of *Lozman v. City of Riviera Beach* (2018) __ U.S. __ [138 S.Ct. 1945] (*Lozman*), this court can and should hold that probable cause does not operate as a bar to appellant's false arrest and Bane Act claims. We find *Lozman* inapplicable. In *Lozman*, the petitioner alleged that high-level city policymakers adopted a plan to retaliate against him for protected speech, then ordered his arrest when he attempted to make remarks during a public-comment portion of a city council meeting. (*Id.* at p. 1949.) The petitioner admitted that there was probable cause for his arrest, however he asserted that the existence of probable cause did not bar his retaliatory arrest claim under the circumstances. (*Ibid.*) The petitioner alleged numerous incidents showing the city's purpose of harassing him. (*Id.* at p. 1950.) Lozman did not sue the officer involved in his arrest, but instead claimed that the City itself retaliated against him pursuant to an "'official municipal policy' of intimidation." (*Id.* at p. 1954.) The *Lozman* court noted that the petitioner's obligation to prove "the existence and enforcement of an official policy motivated by retaliation" separated that case from "the typical retaliatory arrest claim." (*Ibid.*) Under the circumstances, the high court determined that he "need not prove the absence of probable cause to maintain a claim of retaliatory arrest against the City." (*Id.* at p. 1955.) Here, appellant makes no similar claims of an official policy

motivated by retaliation. Therefore, we decline his invitation to declare that the existence of probable cause is not a defense to his claims under the circumstances of this case.

Appellant's reference to *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle* (1977) 429 U.S. 274 is even more attenuated. *Mt. Healthy* arose in a civil context, and involved a school district's decision not to rehire an untenured teacher. The teacher alleged that the decision not to renew his employment was based on his act of engaging in protected speech. (*Id.* at pp. 284-285.) Ultimately, the high court determined that the burden was properly placed on the former teacher to show that his protected conduct was a substantial, or motivating factor in the district's decision not to rehire him. The case does not touch on the issue of probable cause, and does not convince us that the trial court's instruction on probable cause was erroneous in this matter.

D. Evidentiary ruling regarding exhibit 67/93

Appellant asserts that the trial court wrongfully denied his request to admit exhibit 67/93 for impeachment purposes because the video had not been provided to respondents at the beginning of trial. Appellant argues this ruling was erroneous because parties are not required to exchange exhibits that are, in good faith, expected to be used solely for impeachment. Appellant asserts that the video in question was to be used only to impeach Officer Vago's testimony that he could not handcuff appellant's right wrist because appellant had the camera strap around his right wrist. Appellant further asserts that exhibit 67/93 shows no camera strap wrapped around appellant's wrists.

The record undermines appellant's position. The record shows that the trial court did not deny appellant's request to admit the video on the ground that appellant had not provided it to respondents before trial. Instead, the trial court deferred its decision until appellant was able to provide foundation for the

video. Because the trial court never actually excluded the video from evidence, no ruling was made for this court to review. Appellant's failure to pursue the admission of the evidence was his own error, not the trial court's. Because of appellant's failure to seek admission of the evidence, the point was forfeited. (*People v. Rowland* (1992) 4 Cal.4th 238, 259 [If "the defendant does not secure a ruling, he does not preserve the point. That is the rule. No exception is available"].)

Appellant argues to this court that any witness, including Officer Vago, could have authenticated the video. Appellant provides no citation to the record showing where he made this argument to the trial court, nor that he made any subsequent efforts to satisfy the court's request for foundation. Under the circumstances, appellant has forfeited the argument. (*People v. Valdez* (2004) 32 Cal.4th 73, 108 ["'questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court *on the ground sought to be urged on appeal*'"].) We therefore "cannot hold the trial court abused its discretion in rejecting a claim that was never made." (*Id.* at p. 109.)

E. Jury verdict on excessive force

Appellant made a motion for JNOV on the ground that the jury's finding that Officer Medina used excessive force against appellant, but that such force did not cause appellant harm, was inconsistent as a matter of law. Appellant cites *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1018, superseded by statute as stated in *Quarry v. Doe I* (2012) 53 Cal.4th 945, 960, for the proposition that a battery, without consent, causes harm as a matter of law. The facts of *DeRose* involved sexual assault against a child victim. In this case, the facts regarding the cause of any harm to appellant are quite different and more complex. The jury could reasonably have determined that appellant's

decision to resist arrest was a causal factor in any harm he may have suffered.

Further, the special verdict form asked separate questions, each of which required a yes or no answer. In Question 2 the jury was asked whether any officer, by name, used unreasonable force in detaining appellant; and if so, in Question 3, whether such use of unreasonable force was a substantial factor in causing harm to appellant. The verdict form made it clear that if the jury answered yes to Question 2, they were to answer Question 3 as to that named officer. The jury found that Officer Medina used unreasonable force in Question 2, but in answer to Question 3 concluded that said use of force was not a substantial factor in causing harm to appellant.

The special verdict form submitted by appellant found in the record similarly permits the jury to answer yes to the question of whether an officer used unreasonable force, but answer no to the question of whether such force was a substantial factor in causing harm to appellant. Appellant's proposed special verdict differs from the special verdict form in that it offers a more limited version of Question 2. After brief argument, appellant submitted to the court's decision to use the version proffered by respondent. Appellant made no argument that the inclusion of both Question 2 and Question 3 might lead to inconsistency. Thus, we find no error in the verdict form on this point.

The larger dispute centered on Question 4 which was resolved by the trial court's decision to use the version submitted by respondent over appellant's objection that his argument regarding lack of enforcement of the ordinance was being ignored. As thoroughly discussed above (sections IB & IC) we find no error in the trial court's use of the ordinance in jury instructions.

DISPOSITION

The judgment is affirmed. The respondents are awarded their costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST